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Arizona Corporation Commission

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BEFORE THE ARIZONA POWER PLANT

AND TRANSMISSION LINE SITING COMMITTEE
NOV 28 2008

IN THE MATTER OF THE APPLICATION OF
ARIZONA PUBLIC SERVICE COMPANY, IN
CONFORMANCE WITH THE
REQUIREMENTS OF ARIZONA REVISED
STATUTES §§ 40-360, *et seq.*, FOR A
CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AUTHORIZING THE TS-5
TO TS-9 500/230 kV TRANSMISSION LINE
PROJECT, WHICH ORIGINATES AT THE
FUTURE TS-5 SUBSTATION, LOCATED IN
THE WEST HALF OF SECTION 29,
TOWNSHIP 4 NORTH, RANGE 4 WEST AND
TERMINATES AT THE FUTURE TS-9
SUBSTATION, LOCATED IN SECTION 33,
TOWNSHIP 6 NORTH, RANGE 1 EAST, IN
MARICOPA COUNTY, ARIZONA.

DOCKETED BY

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DOCKET NO. L-00000D-08-0330-00138

CASE NO. 138

**COMMISSION STAFF'S BRIEF ON
SUBSTANTIAL DEVIATION**

As a part of its application, applicant Arizona Public Service Company ("APS" or "Applicant") provided an alternative route 3 ("Alternative 3") connecting the final component of the proposed power line into the TS-9 substation. Intervener Diamond Ventures LLC proposed a variation on Alternative 3 ("Alternative 3 North") to narrow the proposed corridor such that substantially all of that component of the line would be on public land. Intervener DLGC LLC proposed a further modification to Alternative 3 North wherein a segment approximately 2 miles in length along the route would be shifted by an increment of 500 feet to the south ("Alternative 3 North-South").

A number of issues have arisen due to the proposal of the Alternative 3 North-South, principally owing to the fact that the 500 foot southward expansion of the corridor is outside the bounds of the requested corridor that was articulated in the notice that APS had published from July 8, 2008 to July 10, 2008. During proceedings before the Arizona Power Plant and Line Siting Committee ("Committee"), Committee Chair John Foreman directed interested parties and Arizona Corporation Commission ("Commission") Utilities Division Staff ("Staff") to provide briefs addressing the legal issues presented by the proposal. Likewise, interested parties were allowed to discuss the same issues with respect to the Westwing Corridor and the West of Hassayampa River

1 alternative ("W-1"). Staff will discuss the legal framework for the analysis first and then address the
2 particulars of the various routes that are implicated by the issues in the context of the facts presented
3 in this matter.

4 **I. SUBSTANTIAL DEVIATIONS FROM THE ORIGINAL NOTICE NECESSITATE**
5 **RE-NOTICING IN ORDER FOR THE COMMITTEE TO CONSIDER THE**
6 **CHANGE.**

7 Arizona Revised Statute ("A.R.S.") 40-360.04(A) provides that:

8 If the committee subsequently proposes to condition the certificate on the use of a site
9 other than the site or alternative sites generally described in the notice and considered
10 at the hearing, a further hearing shall be held thereon after public notice.

11 However, Arizona Administrative Code Rule R14-3-207(B) explains that the presiding officer of the
12 Committee may permit an applicant for a CEC to amend the application in the event that the
13 amendment does not constitute a substantial deviation.

14 The clearest case on point is Decision No. 58793 (September 21, 1994) ("*Whispering*
15 *Ranch*"). *Whispering Ranch* developed from an original application made by Salt River Project
16 ("SRP") for a CEC for its Mead-Phoenix 500 kV intertie that was approved in Decision No. 54792
17 (November 26, 1985). At the prompting of homeowners within the Whispering Ranch Estates
18 subdivision, the Commission reconsidered the CEC in Decision No. 58793. Among the issues raised
19 was whether SRP's construction of an AC line rather than the requested and approved DC line
20 required an amendment to the original application and if residents of Whispering Ranch Estates were
21 sufficiently noticed in light of SRP's change in construction from the approved CEC.

22 Originally SRP requested and was authorized by the Committee to construct a 500 kV DC
23 transmission line that would ultimately connect the Mead substation in Nevada to a substation in
24 Phoenix. After SRP obtained approval, Western Area Power Administration ("WAPA") announced
25 within the Federal Register of September 7, 1990 that the line would instead be a 500 kV AC line
26 with a capability to be upgraded into a +- 500 kV DC line. *Whispering Ranch* at 8. Further, SRP
27 filed the required 10 year plans from 1986 through 1988 noting the line as a 500 kV DC line. From
28 1989 to 1990, SRP's 10 year plan for the line evolved from stating that SRP was studying the 500 kV
line as a DC line into "The proposed 500kV transmission line will be constructed initially as 500kV

...

1 alternating current (AC) with the capability of being converted to direct current (DC) in the future.”

2 *Whispering Ranch* at 9.

3 The distinction between the impact of a DC as opposed to AC line was an evidentiary matter
4 discussed by SRP. As noted by *Whispering Ranch*, in the decision approving the original CEC,
5 Decision No. 54792, testimony was elucidated that explained DC transmission lines do not cause any
6 known health or biological effects. *Whispering Ranch* at 11. However, evidence was presented
7 establishing that AC transmission lines produce a “coupling effect” on both humans and animals
8 owing to electromagnetic fields that are not produced by DC lines. *Id.*

9 In determining whether the changes introduced by SRP post-approval of its CEC required an
10 amendment of the original application, the Commission considered the Arizona Administrative
11 Procedure Act, A.R.S. §41-1001 *et seq.* and its provisions governing when a modification to a
12 proposed administrative rule is so significant as to require re-noticing prior to final adoption as set
13 out by A.R.S. §41-1025. *Whispering Ranch* at 10-11. Specifically, the Commission evaluated and
14 adopted the criterion of A.R.S. §41-1025 regarding substantial difference between an adopted rule
15 from the proposed rule with an emphasis on “the extent to which all persons affected by the adopted
16 rule should have understood that the published proposed rule would affect their interests.”
17 *Whispering Ranch* at 11 quoting A.R.S. §41-1025(B)(1).

18 Adapting the criterion to the context of a line siting case, the Commission noted that
19 extensive debate surrounded the issue of potential health impacts related to AC lines as opposed to
20 DC lines and thereby concluded that the issue was significant and represented a substantial change.
21 *Whispering Ranch* at 13. In reaching that determination, the Commission noted that SRP had
22 originally gone “to great length to differentiate DC from AC lines and to highlight the lack of
23 biological and health effects from DC lines.” *Id.* at 14.

24 Having made such a point of the differences in biological effects between DC and
25 AC current in its 1985 presentation, SRP is now on shaky ground in arguing that the
26 difference is so insignificant that the utility can proceed without applying for a new
27 CEC or a modification to the existing CEC. *Id.*

1 Further, the Commission observed that the issue of health and biological effects is specifically noted
2 within the purpose clause of the line siting statutes found at A.R.S. § 40-360 *et seq.* *Whispering*
3 *Ranch* at 14.

4 **II. APPLICATION OF *WHISPERING RANCH* TO THE ALTERNATIVE 3 NORTH-**
5 **SOUTH, WESTWING CORRIDOR, AND WEST OF HASSAYAMPA**
6 **ALTERNATIVES.**

7 Applying the *Whispering Ranch* standard to the factual circumstances of the discussed
8 alternative routes that exist outside of the noticed corridor, Staff believes that it may be possible that
9 the Alternative 3 North-South could be considered an insubstantial change whereby the Applicant
10 does not need to re-notice the changed corridor in order for the Committee and Commission to
11 consider it. The proposal suggests an expansion of the existing Alternative 3 corridor by an
12 increment of 500 feet to the south for a segment approximately 2 miles in length. It could be
13 asserted that the "affected person" for the purposes of the *Whispering Ranch* analysis is the Arizona
14 State Land Department ("ASLD"). The noticed Alternative 3 corridor presently crosses ASLD land,
15 and it is Staff's understanding from the evidence provided at hearing that the proposed change will
16 occur solely on ASLD land. It remains to be determined whether ASLD would have had reason to
17 know from the original notice that the change could have been foreseen. It is also unknown to Staff
18 if other persons may have an interest impacted under these circumstances.

19 As Staff noted during the proceedings, it is conceivable that other interested persons may be
20 affected persons. For example, if a neighboring landowner were to discover that a line that originally
21 was noticed as being no closer than 500 feet was relocated directly on the border of his property.
22 Staff believes that evaluation of this issue would require consideration of whether other interests
23 were implicated by the original notice and an opportunity to appropriately defend that same interest
24 earlier was foregone. Staff believes that one way to be certain that ASLD and any interested persons
25 have sufficient notice of the change is to re-notice the changes to Alternative 3 that constitute the
26 Alternative 3 North-South.

27 With respect to the W-1 proposal, Staff believes that the analysis would be similar to the one
28 undertaken for the Alternative 3 North-South. Staff notes that, being significantly longer, the
likelihood of a substantial deviation increases. Likewise, Staff has not evaluated whether additional

landowners not already present in the proceedings would be impacted by the W-1 proposal.

Staff does not believe that the Westwing Corridor can be reasonably considered an insignificant deviation from the notice provided in this proceeding. Although that path may have been vetted for the public scoping process that APS employed prior to making the application, the path is clearly not described in the notices published for the proceeding between July 8 and July 10, 2008. The Westwing Corridor is likewise not sandwiched between two closely situated alternatives and located entirely adjacent to an already noticed corridor. There has not been sufficient testimony with regard to the Westwing Corridor for Staff to determine if additional landowners whose interests were not affected by the routes APS proposed would likely be interested in a Westwing Corridor either. Considering the lack of any basis to conclude that the path might be in jeopardy of a proposed corridor from the description provided in the notice, Staff believes that the Westwing Corridor is clearly a substantial deviation from the notice and would require re-noticing in order for the Committee to consider.

III. CONCLUSION.

Under the facts presented in this case, whether an alteration to the application is a substantial deviation requires an evaluation of the sufficiency of the notice to interested persons and parties. Staff is not in a position to recommend a conclusion that either the Alternative 3 North-South or the W-1 proposals represent substantial deviations from the hearing notice. However, Staff does believe that the Westwing Corridor proposal is beyond the bounds of the hearing notice and would require re-noticing in order to be considered.

RESPECTFULLY SUBMITTED this 28th day of November, 2008.

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